

D.T.E. 03-88A-F

Investigation by the Department of Telecommunications and Energy on its own motion, pursuant to G.L. c. 164 §§ 1A(a), 1B(d), 94; and 220 C.M.R. § 11.04, into the costs that should be included in default service rates for Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, Fitchburg Gas and Electric Light Company, Massachusetts Electric Company and Nantucket Electric Company, and Western Massachusetts Electric Company.

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## HEARING OFFICER RULINGS ON PETITIONS FOR LEAVE TO INTERVENE

### I. INTRODUCTION AND PROCEDURAL HISTORY

On January 20, 2004, in compliance with Costs to be Included in Default Service Rates, D.T.E. 03-88 (2003), Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company (together, “NSTAR”), Fitchburg Gas and Electric Light Company (“Fitchburg”), Massachusetts Electric Company and Nantucket Electric Company (together, “MECo”), and Western Massachusetts Electric Company (“WMECo”) (collectively, “Distribution Companies”) submitted filings to the Department of Telecommunications and Energy (“Department”) regarding costs that they propose to be included in the calculation of their default service rates. The Department docketed these filings as: Boston Edison Company, D.T.E. 03-88A; Cambridge Electric Light Company, D.T.E. 03-88B; Commonwealth Electric Company, D.T.E. 03-88C; Fitchburg Gas and Electric Light Company, D.T.E. 03-88D; Massachusetts Electric Company, D.T.E. 03-88E;

and Western Massachusetts Electric Company, D.T.E. 03-88F (together, “D.T.E. 03-88A-F”).

On February 17, 2004, the Department issued a Notice of Public Hearing (“Notice”) that established a deadline of March 2, 2004 for petitions to leave to intervene in the proceedings. The Attorney General of the Commonwealth (“Attorney General”) filed notices of intervention pursuant to G.L. c. 12, § 11E in D.T.E. 03-88A-F. Each of the Distribution Companies submitted timely petitions for limited participant status in the proceedings of the other Distribution Companies. The Cape Light Compact filed timely petitions for limited participant status in D.T.E. 03-88A, D.T.E. 03-88B, and D.T.E. 03-88C.<sup>1</sup>

The following entities submitted timely petitions to intervene in each of the proceedings: (1) Constellation New Energy, Inc. (“Constellation”); (2) the Low-Income Weatherization and Fuel Assistance Network and Massachusetts Community Action Program Directors Association, Inc. (together, “MASSCAP”); and (3) Select Energy, Inc. (“Select”). In addition, the following entities filed timely petitions for leave to intervene or to otherwise participate in D.T.E. 03-88A-F, but failed to serve copies of their petitions on counsel for the respective Distribution Companies as required by 220 C.M.R. § 1.05(1): (1) Direct Energy/Centrica North America (“Centrica”); (2) the Commonwealth of Massachusetts

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<sup>1</sup> The Cape Light Compact was formed in 1997 through an intergovernmental agreement of 21 towns and two counties for the purpose of establishing competitive power supply, energy efficiency, and consumer advocacy. The Cape Light Compact consists of the Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, Yarmouth, and the Counties of Barnstable and Dukes.

Division of Energy Resources (“DOER”); and (3) Dominion Retail, Inc. (“Dominion”).

Finally, the Associated Industries of Massachusetts (“AIM”) submitted timely electronic mail petitions to intervene in D.T.E. 03-88A-F, but failed to file original paper copies in a timely manner as required by 220 C.M.R. § 1.03(1), and also failed to serve its petitions on counsel for the respective Distribution Companies.<sup>2</sup>

On March 11, 2004, the Department conducted a joint public hearing and procedural conference in D.T.E. 03-88A-F. The Hearing Officer allowed AIM, Centrica, DOER, and Dominion until March 12, 2004, to perfect service of their respective petitions to intervene on counsel for the Distribution Companies. The Hearing Officer also permitted AIM to address the issue of the late-filed paper copies of its petitions (Tr. at 34).

At the procedural conference, the Hearing Officer allowed, without objection, MASSCAP’s petitions for leave to intervene in D.T.E. 03-88A-F (Tr. at 16, 22, 28, 31). The Hearing Officer also allowed, without objection, the following requests for limited participant status: (1) Cape Light Compact, Fitchburg, MECo, and WMECo in D.T.E. 03-88A, D.T.E. 03-88B, and D.T.E. 03-88C; (2) MECo, NSTAR, and WMECo in D.T.E. 03-88D; (3) Fitchburg, NSTAR, and WMECo in D.T.E. 03-88E; and (4) Fitchburg, MECo, and NSTAR in D.T.E. 03-88F (Tr. at 8, 17, 23, 28).

Although 220 C.M.R. § 1.03(1)(d) permits five days to file an answer to a petition to intervene, the Hearing Officer allowed oral argument on the petitions of Constellation and

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<sup>2</sup> The Department’s procedural rules do not expressly provide for electronic mail filing or service of documents. See 220 C.M.R. § 1.02(8).

Select (Tr. at 9-16, 18-22, 24-27, 29-31). In addition, the Hearing Officer allowed the Distribution Companies to respond to the petitions with service defects (AIM, Centrica, DOER, and Dominion) in writing and, pursuant to 220 C.M.R. § 1.06(6)(a), allowed these petitioners an opportunity to respond to the Distribution Companies' comments (Tr. at 32-33). In order to consider the oral and written comments, the Hearing Officer took under advisement the following petitions for leave to intervene or to otherwise participate in D.T.E. 03-88A-F: (1) AIM, (2) Centrica, (3) Constellation, (4) DOER, (5) Dominion, and (6) Select (Tr. at 16, 22, 28, 31).

## II. STANDARD OF REVIEW

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. §1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978); see also Robinson v. Department of Public Utilities, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. 1, 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited

participation. Boston Edison, 375 Mass. 1, 45. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

### III. PETITIONS AND RESPONSES

#### A. AIM

On March 15, 2004, AIM submitted paper copies of its late-filed petitions for leave to intervene in D.T.E. 03-88A-F. AIM explained that the paper-copies of its petitions were untimely due to an internal staffing change (AIM Petitions at 1).

AIM states that it is an organization of Massachusetts companies that represents more than 7,500 employers in the manufacturing and non-manufacturing industries (id.). AIM further states that it represents the interests of commercial and industrial customers (“C&I”) of the Distribution Companies and that AIM’s members will be substantially and specifically affected by the proposed changes to default service rates (id.). AIM, therefore, requests that it be granted full-party intervenor status in these proceedings (id.). MECo, NSTAR, and WMECo do not oppose AIM’s petitions to intervene in D.T.E. 03-88A-F (MECo Responses at 1; NSTAR Responses at 3; WMECo Responses at 2-3).

#### B. DOER

DOER states that it is the executive agency responsible for establishing and implementing the Commonwealth’s energy policies and programs (DOER Petitions at 1, citing G.L. c. 25A § 6). Further, DOER maintains that one of its responsibilities is to plan, develop, oversee, and operate plans to help consumers understand, evaluate, and select retail energy supplies and related services offered as a consequence of electric restructuring (id.).

DOER submits that its ability to develop and implement governmental policies with respect to the Commonwealth's energy programs will be substantially and specifically affected by these proceedings (DOER Petitions at 2). Therefore, DOER requests that it be granted full-party intervenor status in these proceedings (id.). MECo, NSTAR, and WMECo do not oppose DOER's petitions to intervene in D.T.E. 03-88A-F (MECo Responses at 1; NSTAR Responses at 3; WMECo Responses at 2-3).

C. CENTRICA, CONSTELLATION, DOMINION, AND SELECT

1. Centrica

Centrica states that it is one of the largest multi-state providers of deregulated energy services in the United States (Centrica Petitions at 2-3). Centrica notes that it has participated actively in efforts to make the Massachusetts retail market more competitive (id. at 3).

Centrica argues that its ability to enter and compete in the Massachusetts market will be substantially and specifically affected by the Department's decision with regard to the allocation of costs between distribution rates and the default service price and, therefore, requests full-party intervenor status in these proceedings (id.). Centrica argues that no other party can adequately represent its interests (id.).

Moreover, in response to the Distribution Companies' arguments that full intervention must be denied because Centrica only has a "commercial interest" in the proceedings, Centrica notes that, for intervention purposes, the Supreme Judicial Court has allowed intervention by competitors within the industry that is the subject of the proceeding (Centrica and Dominion

Joint Responses at 5, citing Cablevision v. Department of Telecommunications and Energy, 428 Mass 436, 438 (1998)).

2. Constellation

Constellation asserts that the Department's determination of the rate to be charged for default service has a direct effect on the development of the competitive market and on the ability of licensed competitive suppliers such as Constellation to compete in the market (Constellation Petitions at 1; Tr. at 11, 27). Accordingly, Constellation argues that it is substantially and specifically affected by these proceedings, that no other entity can adequately represent its interests in these proceedings and, therefore, requests full party intervenor status in D.T.E. 03-88A-F (id.).

3. Dominion

Dominion contends that as a licensed electric supplier pursuing long-term power supply for default service customers, it is substantially and specifically affected by the Department's decision in these proceedings (Dominion Petitions at 1-2). Accordingly, Dominion requests the ability to: (1) file written comments; (2) attend and participate in procedural and public hearings; (3) submit briefs; and (4) other rights as may be afforded participants in these proceedings (id. at 2).

Moreover, in response to the Distribution Companies' arguments that full intervention must be denied because Dominion only has a "commercial interest" in the proceedings, Dominion notes that, for intervention purposes, the Supreme Judicial Court has allowed intervention by competitors within the industry that is the subject of the proceeding (Centrica

and Dominion Joint Responses at 5, citing Cablevision v. Department of Telecommunications and Energy, 428 Mass 436, 438 (1998)).

4. Select

Select states that as an electric supplier licensed by the Department, it is substantially and specifically affected by these proceedings by the Department's decision on the costs to include in the default service rate (Select Petitions at 1-2; Tr. at 15). Select states that no other entity can adequately represent its interests in these proceedings and, therefore, requests full party intervenor status in D.T.E. 03-88A-F (id.).

C. DISTRIBUTION COMPANY RESPONSES TO THE PETITIONS OF CENTRICA, CONSTELLATION, DOMINION AND SELECT

The Distribution Companies object to the petitions to intervene of Centrica, Constellation, Dominion, and Select (together, the "Electric Suppliers") in D.T.E. 03-88A-F (Fitchburg Responses at 1; MECo Responses at 1; NSTAR Responses at 3; WMECo Responses at 4; Tr. at 9-10, 18-19, 24-25, 29-30). Instead, MECo, NSTAR, and Fitchburg propose that the Department grant the Electric Suppliers limited participant status in each of the proceedings (Fitchburg Responses at 1; MECo Responses at 1; NSTAR Responses at 9).

With respect to the specific petitions of Centrica, NSTAR argues that, although Centrica requests full-party status, its petitions fail to meet threshold requirements for a petition to intervene (i.e., they fail to state "the contention of the petitioner, the relief sought, and the statutory or other authority therefore, and the nature of the evidence the petitioner will present if the petition is granted") (NSTAR Responses at 6-7, citing 220 C.M.R. § 1.03(1)(b)). With respect to the specific petitions of Dominion, MECo and NSTAR argue that Dominion's



petitions do not explicitly request full-party status, but rather appear consistent with a request for limited participant status (MECo Responses at 3; NSTAR Responses at 7). Further, MECo and NSTAR contend that Dominion failed to state in its petition how it will be substantially and specifically affected by these proceedings as required by 220 C.M.R. § 1.03(1)(b) (MECo Responses at 3; NSTAR Responses at 7).

With respect to all of the Electric Supplier petitions, MECo, NSTAR, and WMECo argue that the Department has broad discretion to grant or deny intervention (MECo Responses at 2 citing Tofias v. Energy Facilities Siting Board, 435 Mass. 340, 346 (2001); NSTAR Responses citing Tofias at 340, 346 (2001); WMECo Responses at 3 citing Tofias at 340, 346). Further, the Distribution Companies argue that the Electric Suppliers' interests are purely commercial and that neither the Electric Suppliers themselves nor their customers are Distribution Company default service customers (NSTAR Responses at 8; MECo Responses at 3; Fitchburg Responses at 1; WMECo Responses at 4; Tr. at 9-10, 18, 24). MECo, NSTAR, and WMECo contend that in Cablevision Systems Corp. v. Department of Telecommunications and Energy, 428 Mass. 436 (1998), the Supreme Judicial Court upheld a Department decision denying full-party status to Cablevision (as a competitor to an unregulated affiliate of Boston Edison Company) on the grounds that (1) a commercial interest alone does not qualify a party for intervention status; and (2) in ruling on a petition to intervene, the Department's primary duty is to protect the interests of ratepayers versus the commercial or economic interests of a petitioner seeking to intervene (MECo Responses at 2; NSTAR Responses at 5-6; WMECo Responses at 2; Tr. at 10). In sum, the Distribution Companies

argue that the Electric Suppliers cannot be substantially and specifically affected by these proceedings (Fitchburg Responses at 1; MECo Responses at 3; NSTAR Responses at 8; WMECo Responses at 4).

The Distribution Companies further contend that the scope of these proceedings is limited to the Department's review of the costs that should be included in the calculation of default service rates (Tr. at 24-25, 29-30). Therefore, the Distribution Companies argue that the Electric Suppliers' interests lie beyond the scope of these proceedings and that the Electric Suppliers are indirectly and, at most, tangentially affected by D.T.E. 03-88A-F (Fitchburg Responses at 1; MECo Responses at 3; NSTAR Responses at 8; WMECo Responses at 4; Tr. at 8-10, 24, 29).

#### IV. RULINGS

##### A. AIM

In ruling on late-filed petitions to intervene, or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, the Department considers whether a petitioner has demonstrated good cause for late-filing. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise definition, the proponent of a waiver must make a convincing showing of good cause and may not reserve such a showing for a later appeal of the Hearing Officer's ruling. See Bay State Gas Company, D.P.U. 95-52, at 2 (Interlocutory Order, July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is

substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion.

Although AIM's official filings were untimely, it did file electronic copies of its petitions to intervene in a timely manner and there were no objections to AIM's request for full-party status in each proceeding. As good cause, AIM explains that the late-filing was the result of oversight caused by an internal staffing change. Therefore, I find that AIM has made a convincing showing of good cause, sufficient to consider the petition. 220 C.M.R. § 1.10.(4).

AIM represents the interests of the C&I customers of the Distribution Companies. I find that AIM has established that its members may be substantially and specifically affected by the proposed changes to default service rates that may occur as the result of these proceedings. Because AIM's petitions, although late, were filed prior to a procedural schedule being set, I find that allowing AIM to participate as a full party will not affect the Department's ability to conduct the proceedings in a complete, efficient, and orderly fashion. Therefore, pursuant to 220 C.M.R. § 1.03, I grant AIM's petitions for leave to intervene as a full party in D.T.E. 03-88A-F.

B. DOER

DOER argues that it is substantially and specifically affected by the Department's decision in these proceedings because it is charged by the Legislature to develop consistent energy policies, including default service and, therefore, seeks full party status in D.T.E. 03-88A-F. There were no objections to DOER's petitions.

Pursuant to G.L. c. 25A § 6, DOER is authorized to “advise, assist, and cooperate with other state, local, regional, and federal agencies in developing appropriate programs and policies relating to energy planning and regulation in the commonwealth,” as well as to “intervene and advocate on behalf of small commercial and industrial users before the [Department] in any dispute between such business and generation or distribution companies.” G.L. c. 25A §§ 6(2), 6(12). While policy decisions surrounding the cost components to be included in the calculation of default service rates have already been made in D.T.E. 02-40-B, other policy decisions remain to be made in these proceedings regarding the appropriate amount of costs to be included in default service rates. Because DOER has been given certain responsibility for energy policy development in the Commonwealth pursuant to G.L. c. 25A § 6, I find that DOER has established that it may be substantially and specifically affected by the policy decisions to be made in these proceedings. Therefore, pursuant to 220 C.M.R. § 1.03, I grant DOER’s petitions for leave to intervene as a party to D.T.E. 03-88A-F.

C. ELECTRIC SUPPLIERS

Because of the large number of customers that will consume electricity provided through default service as of March 1, 2005, the manner in which the electricity it is procured and priced will significantly affect the development of the competitive supply market. Provision of Default Service, D.T.E. 02-40, at 1 (2002). The Department has stated that default service prices should include “all costs of providing default service in order to allow competitive suppliers a fair and reasonable opportunity to compete for default service customers” Provision of Default Service, D.T.E. 02-40-B at 14-15 (2003). In addition, we

have noted that default service “may serve as a barrier to competition as long as competitive suppliers must recover all of their costs through the prices they charge customers, while distribution companies are able to recover some of their default service-related costs through their distribution base rates.” Id. Thus, any Department decision concerning the amount of costs that will be included default service rates could substantially and specifically affect each of the Electric Suppliers. Although the Distribution Companies argue that the Electric Suppliers cannot be substantially and specifically affected by the investigations in D.T.E. 03-88A-F because they have only a “commercial” interest in the outcome of the proceedings, the Supreme Judicial Court has recognized that “intra-industry competitors have had standing to challenge agency action that allegedly caused them harm.” See Cablevision Systems Corp. v. Department of Telecommunications and Energy, 428 Mass. 436, 438 (1998) (citations omitted).

The Department has already identified the cost components that should be included in the calculation of default service rates. See D.T.E. 02-40-B at 8-21. The investigations at issue will determine the amount of these identified default service cost components that are incurred by each distribution company. D.T.E. 03-88, at 1, citing D.T.E. 02-40-B at 15-21. To do this, the Department will consider whether, among other things, the Distribution Companies’ filings are consistent with the findings in D.T.E. 02-40-B, G.L. c. 164, §§ 1A(a), 1B(d), and 94, and 220 C.M.R. § 11.04(9)(c). D.T.E. 03-88, at 1-2.

As providers of competitive supply, the Electric Suppliers are under the Department’s regulatory umbrella, subject to the (1) regulations contained in 220 C.M.R. §§ 11.05, 11.06,

and 11.07, and (2) Distribution Companies' Department-approved tariffs governing the relationship between the Distribution Companies and competitive suppliers.

220 C.M.R. § 11.04(9)(f); Model Terms and Conditions for Competitive Suppliers,

D.T.E. 97-65 (Att. II) (1997). The Electric Suppliers have actively participated in a number of Department proceedings regarding the development of rules and regulations governing competition in the electric industry, and their participation in the current investigations may help to develop evidentiary records upon which the Department can base its decisions.<sup>3</sup>

The current investigations in D.T.E. 03-88A-F are consistent with the Department's obligation to ensure that the Distribution Companies accommodate retail access to generation services and choice of electric suppliers by retail customers. G.L. c. 164, § 1A(a). In consideration of the scope of these proceedings and the legal framework discussed above, I

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<sup>3</sup> The distribution companies, their competitive energy affiliates, energy suppliers and brokers and other public interest groups have participated in a number of Department initiatives to ensure that default service is compatible with the development of an efficient competitive market and to ensure that the benefits of a competitive market are available to all Massachusetts consumers. See e.g., Pricing and Procurement of Default Service, D.T.E. 99-60-A (2002); D.T.E. 99-60-B (2000); D.T.E. 02-40, at 1 (2002); D.T.E. 02-40-A (2003) (effects of congestion costs and locational marginal pricing); D.T.E. 02-40-B (2003) (cost components that the Company proposes to be included in its calculation of default service rates); D.T.E. 02-40-C (2003) (working group established to propose quarterly procurement standards, protocols, and schedules).

grant the petitions to intervene of Centrica, Constellation, Dominion,<sup>4</sup> and Select, in

D.T.E. 03-88A-F and allow them full-intervention status.

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<sup>4</sup> NSTAR and MECo argue that Dominion did not explicitly request “full party” or “intervenor” status in its petitions. As stated above, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. 390 Mass. 208, 216. I construe Dominion’s request to “participate in procedural and public hearings” and “other such rights as may be afforded to participants in this proceeding” as a request for full-party status (Dominion Petitions at 2).

V. APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any affected person may appeal this ruling to the Commission by filing a written appeal with supporting documentation by August 10, 2004. A written response to any appeal must be filed by August 17, 2004.

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John J. Geary  
Hearing Officer